WEMBLEY I.B.A.E. SDN BHD A

v.

TIMOR ENTERPRISES SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR B
RAMLY ALI J
[CIVIL SUIT NO. D5-22-1597-2002]
14 SEPTEMBER 2005

CIVIL PROCEDURE: *Disposal of action without trial - Striking out - Appeal - Delay in filing striking out application - Mandatory requirement - Inordinate delay in proceeding with action - Rules of the High Court 1980, O. 3 r. 6, O. 18 r. 20, O. 34 r. 2* C

The plaintiff served the writ and statement of claim on the defendant and the defendant filed their defence. The plaintiff did not lodge its intention to proceed under O. 3 r. 6 Rules of the High Court ("RHC"). A year and five months later, the plaintiff took out its notice for pre-trial case management ("encl. 4"). In the interim period, the plaintiff issued their "Notis Menghendaki Menentusahkan Senarai Dokumen" pursuant to O. 24 r. 2 RHC to the defendant. The defendant filed in their striking out application seeking to strike out the plaintiff's claim for want of prosecution ("encl. 6") which said application was allowed by the senior assistant registrar with costs ("said decision"). This is an appeal lodged by the plaintiff against the said decision. The issues were: (a) whether the senior assistant registrar erred in law and fact in allowing the defendant to strike out the plaintiff's claim for want of prosecution; (b) whether the defendant had made their striking out application in encl. 6 in a prompt manner; (c) whether the plaintiff had in fact set down this matter for trial *vide* its case management notice in encl. 4; and (d) whether this action is obviously unsustainable. D E F G

Held (dismissing the plaintiff's appeal with costs and reaffirming the said decision): H

(1) The court has an inherent jurisdiction to strike out or dismiss a claim for want of prosecution. An action may also be struck out or dismissed for want of prosecution if the inordinate and inexcusable delay amounts to a wholesale and blatant disregard for the rules of the court with full awareness of its consequences. Prejudice needs to be shown. (para 11) I

(2) In the present case, no reply was issued by the plaintiff to the defendant's defence and by operation of O. 18 r. 20(1) RHC, pleadings were deemed closed 14 days after service of the defence on the plaintiff. Enclosure 4 was taken out one year and five months after the close of pleadings showing a blatant and wholesale disregard by the plaintiff of O. 34 RHC. Despite a substantial lapse of time, the plaintiff did not issue any notice of intention to proceed under O. 3 r. 6 RHC. Compliance with O. 3 r. 6 RHC is mandatory. This is a rule of essential justice and fairness and failure to comply warrants a setting aside or striking out of the action. Since there is no cogent explanation rendered by the plaintiff for the inordinate delay as well as for the failure to comply with the relevant rules cited above, it makes the inordinate delay inexcusable. The plaintiff was also at all material times represented by solicitors and as such should have been fully aware of the consequences of their conduct in not complying with the rules. The plaintiff is guilty of inordinate and inexcusable delay and blatant disregard of the relevant rules with full awareness of the consequences of its conduct. That by itself is a sufficient ground to strike out or dismiss its claim for want of prosecution without having to prove that the defendant suffers prejudice. (paras 13, 17, 18, 20 & 30)

(3) The purported issue of delay on the part of the defendant in filing in encl. 6 is misconceived for there is no obligation on the part of the defendant, legal or otherwise, to ensure a speedy disposal of the plaintiff's action against itself. It is for the plaintiff to ensure the process of conclusion of the action is expedited. (paras 38 & 39)

(4) Enclosure 4 was taken out one year five months after the close of pleadings without any explanation as to why it was impossible to do so within 14 days from the close of pleadings. The plaintiff's letter dated 25 August 2004 ("said letter") which was in effect a letter issued in response to the defendant having rebuffed the plaintiff's attempts to contrive its claim against the defendant at its leisure, was not issued by the plaintiff with the object of complying with O. 3 r. 6 RHC. The said letter was issued after encl. 4 and as such encl. 4 had nothing to do with the plaintiff's intention to proceed in this matter nor any notice under O. 3 r. 6 RHC to do so. (paras 42, 43 & 45)

(5) Enclosure 6 is premised on the plaintiff's failure to prosecute this action and therefore plainly does not concern the merits of the plaintiff's action against the defendant. The plaintiff has clearly missed the point and that is that the plaintiff had failed to prosecute this action which has been compounded by the plaintiff's blatant and wholesale disregard of the relevant rules to the prejudice of the defendant. (paras 47 & 48)

Case(s) referred to:

Alen v. Sir Alfered MC Phine & Sons Ltd [1968] 2 QB 229 ***(refd)***

Arbuthnot Latham Bank Ltd v. Trafalgar Holdings Ltd & Ors [1997] TLR 698 ***(refd)***

Birkett v. James [1978] AC 297 ***(refd)***

China Insurance Co Ltd v. Yeong Ah Lam & Anor [1973] 2 MLJ 185 ***(refd)***

Choraria v. Sethia [1998] TLR 43 ***(refd)***

Ho Weng Kong v. Mann Fong Realty Sdn Bhd & Anor [2000] 6 CLJ 478 HC ***(refd)***

Malayan Banking Bhd v. Zainon Ismail [2001] 3 CLJ 564 HC ***(refd)***

Negara Properties Sdn Bhd v. Akitek Bersekutu Malaysia [1996] 2 CLJ 923 HC ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***

Overseas-Chinese Banking Corporation v. Norman Wright & Co [1989] 3 MLJ 73 ***(refd)***

Re Soul D Harrison & Sons plc [1995] 1 BCLC 14 ***(refd)***

Trustees of Leong Son Tong Khoo Kongsi v. Lee Boon Tim [1998] 4 CLJ 368 CA ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 3 r. 6, O. 18 r. 20(1), O. 24 r. 2, O. 34 r. 2, O. 35

For the plaintiff - Clarie Joseph; M/s Majid & Chen
For the defendant - Janice Yap; M/s Chooi & Co

Reported by Sharmini Pillai

JUDGMENT

Ramly Ali J:

[1] The plaintiff's notice of appeal to judge in chambers dated 24 March 2005 is the decision of the learned senior assistant registrar (SAR) who had on 22 March 2005 made an order in terms of the defendant's application to strike out the plaintiff's claim for want of prosecution in encl. 6.

A

Brief Facts

[2] The defendant was served with the plaintiff's writ and statement of claim on 20 March 2003.

B

[3] The defence was issued and served by the defendant on 10 April 2003.

[4] It was only approximately one year and five months after service of the defence did the plaintiff take out its notice for pre-trial case management dated 26 August 2004 in encl. 4. The C sealed copy of the notice was received by the defendant through its solicitors on 30 September 2004.

[5] No notice of its intention to proceed under O. 3 r. 6 of the Rules of the High Court 1980 ("RHC") was lodged in court by D the plaintiff.

[6] The only notable event that had punctuated in this interim period was the issuance of the plaintiff's "Notis Menghendaki Menentusahkan Senarai Dokumen" dated 17 March 2004 which E was purportedly issued pursuant to O. 24 r. 2 of the RHC. This notice was received by the defendant on 19 March 2004, and in essence, required the defendant to file an affidavit verifying its list of documents.

[7] The defendant's striking out application in encl. 6 was F allowed by the learned senior assistant registrar on 22 March 2005. The plaintiff's action was accordingly struck out with costs to be paid by the plaintiff to the defendant.

[8] Given the order of the learned senior assistant registrar G referred to above, the plaintiff's case management notice in encl. 4 was struck out by this court on 14 April 2005.

[9] Hence the plaintiiff's appeal before this court.

Want Of Prosecution

H

[10] The court has an inherent jurisdiction to strike out or dismiss a claim for want of prosecution. In *Alen v. Sir Alfered MC Phine & Sons Ltd.* [1968] 2 QB 229 at 268, the Court of Appeal in England ruled that:

I

> A defendant may apply to have an action dismissed for want of prosecution either (a) because of the Plaintiff's failure to comply with the Rules of the Supreme Court or (b) under the court's inherent jurisdiction. In my view it matters not whether the application comes under limb (a) or (b), the same principles apply.

[11] This principle was adopted and applied by the House of Lords in *Birkett v. James* [1978] AC 297, where it was held:

> An action may be dismissed or struck out for want of prosecution where the Court is satisfied that either:
>
> (a) a Plaintiff's default has been intentional and contumelious; or
>
> (b) (i) there has been inordinate and inexcusable delay in prosecuting the claim; and
>
> (ii) such delay will give rise to a substantial risk that is would not be possible for a fair trial of the issues in the action or is such as is likely to cause or to have caused a serious prejudice to the Defendant as between the Plaintiff and the Defendant or between the Defendant and a third part.

An action may also be struck out or dismissed for want of prosecution if the inordinate and inexcusable delay amounts to a wholesale and blatant disregard for the rules of the court with full awareness of its consequences. Prejudice need be shown. In *Trustees of Leong Son Tong Khoo Kongsi v. Lee Boon Tim* [1998] 4 CLJ 368, our Court of Appeal made the following observations:

> This new limb as we understood it to be from the two cases is that where there is inordinate and inexcusable delay which involves complete, total or wholesale disregard of the rules of the Court with full awareness of the consequences is capable of amounting to such an abuse so that if it is fair to do so, the action will be struck out or dismissed on that ground. From the decisions too, it appears to us that there is no necessity to show prejudice in such cases. As can be seen, the law in respect of case flow management in England will only be in operation in 1999 yet the Courts there had already put many aspects of its operation to use.

[12] This decision was cited and followed in *Ho Weng Kong v. Mann Fong Realty Sdn. Bhd. & Anor* [2000] 6 CLJ 478. The inordinate and inexcusable delay involving complete, total, and wholesale disregard of the rules of court with full awareness of the consequences, also amounts to an abuse of the process of the

court, which may be a ground for the claim be struck out or dismissed. On this matter, Nourse LJ in the case of *Choraria v. Sethia* [1998] TLR 43 made the following observations:

> The law, as it applied to this case could therefore be stated thus: although inordinate and inexcusable delay alone, however great, did not amount to an abuse of process, delay which involved complete, total or wholesale disregard, put it how you will, of the rules of Court with full awareness of the consequences, was capable of amounting to such an abuse, so that, if it was fair to do so the action would be struck out or dismissed on that ground.

[13] In the present case, no reply was issued by the plaintiff to the statement of defence which was served on the plaintiff through its solicitors on 10 April 2003. By operation of O. 18 r. 20(1) of the RHC, pleadings in this case were therefore deemed closed on 25 April 2003 ie, 14 days after the service of the statement of defence on the plaintiff.

[14] It was only one (1) year and five (5) months after close of pleadings did the plaintiff take out its case management notice in encl. 4. This demonstrates the plaintiff's blatant and wholesale disregard for the provisions of the RHC for failing to comply with, O. 34 of the RHC within their respective prescribed timeframes.

[15] Order 34 of the RHC deals with pre-trial case management in actions begun by writ which was enforced *vide* PU(A) 342/2000. Rule 2(1) requires the plaintiff to cause to be issued a notice in Form 63 not later than 14 days after the close of pleadings requiring the parties to the action to attend before the judge for pre-trial case management. Failure to comply with such requirements, the court is empowered to issue a notice to show cause to the plaintiff as to why the action should not be stuck out. These provisions were inserted into the RHC in 2000 for the purpose of hastening the hearing and disposal of actions brought before the courts, and ultimately to overcome the problem of backlog of cases due to unnecessary delay in the country. The importance of pre-trial case management is for the parties to observe the time limits provided by the rules so that the actions could be brought to trial within time. In *Arbuthnot Latham Bank Ltd. v. Trafalgar Holdings Ltd. & Ors* [1997] TLR 698, Lord Woolf MR said:

> The existing rules contained time limits which were designed to achieve the disposal of litigation within a reasonable time scale. Those rules should be observed.

[16] It is to be noted that in both the *Arbuthnot* and *Choraria* cases the defendant's appeal to strike out the plaintiff's claim was allowed on the ground of inordinate and inexcusable delay which involved complete, total or wholesale disregard of the rules of the court pertaining to pre-trial case management. The same ground was also adopted by our Court of Appeal in *Trustees of Leong San Tong Khoo*'s case where the defendant's appeal to strike out the plaintiff's claim was also allowed with costs. In that case, Mokhtar Sidin JCA made the following remarks:

> Our Courts are definitely moving towards this case flow management era. As such, we see no reason why we should not adopt the principles as stated in those two decisions. (referring to the decisions in *Arbuthnot* and *Choraria* case).

In that case *(Trustees of Leong San Tong Khoo)* there was a delay of one (1) year and nine (9) months from the date the pleadings were deemed to be closed until the plaintiff filed his summons for direction, under O. 35 of the RHC.

[17] In the present case, despite substantial lapse of time, the plaintiff did not issue any notice of intention to proceed as required under O. 3 r. 6 of the RHC. This notice of intention to proceed as required has not been issued by the plaintiff at any rate till today. A perusal of the records in the court's files shows this to be the case. Order 3 r. 6 requires that "where a year or more has lapsed since the last proceeding in a cause or matter, the party who desires to proceed must give to every other party not less than one month's notice of his intention to proceed."

Compliance with O. 3 r. 6 is mandatory (see: *Malayan Banking Bhd. v. Zainon Ismail* [2001] 3 CLJ 564; and *China Insurance Co. Ltd. v. Yeong Ah Lam & Anor* [1973] 2 MLJ 185). The rationale for this rule is obvious: it is to afford the defendant an early opportunity to protect its interests and to prevent the defendant from being taken by surprise. This is a rule of essential justice and fairness. Since the requirement of this rule is mandatory, failure to comply warrants a setting aside or striking out of the action, relying on the decision of *China Insurance Co. Ltd. v. Yeong Ah Lam*, which was approved by the Court of Appeal in *Ng Hee Thoong & Anor v. Public Bank Bhd.* [1995] 1 CLJ 609.

[18] There is no cogent explanation rendered by the plaintiff for the inordinate delay as well as for the failure to comply with the relevant rules cited above. That makes the inordinate delay

inexcusable. The only explanation that has been rendered by the plaintiff for the delay in prosecuting this action is that the defendant has not provided it with the "relevant documents". This explanation does not render the delay excusable.

[19] The above considerations have demonstrated the following facts:

(a) that there was inordinate and inexcusable delay of one (1) year and five (5)months after the pleadings deemed to be closed that the plaintiff took out its notice for pre-trial case management under O. 34 r. 2;

(b) that there was no notice of intention to proceed under O. 3 r. 6 lodged by the plaintiff; and

(c) that the plaintiff did not seek leave of the court or obtain the consent of the defendant for an extension of time to file its O. 34 r. 2 notice for case management which is supposed to be within the 14 days period prescribed in the order.

[20] These are the plaintiff's blatant and wholesale disregard of the relevant provisions of the rules. The plaintiff was at all material times represented by solicitors. They should be fully aware of the consequences of such conducts in not complying with those rules. On that ground alone, applying the principles enunciated in *Arbuthnot* and *Choraria* as well as in *Trustees of Leong Saw Tong Khoo*, the plaintiff's claim against can and should be struck out and dismissed for want of prosecution, without having to prove its prejudicial effects on the defendant.

[21] The plaintiff now attempts to place the blame on the defendant for its indolence in prosecuting this action. This is ostensibly on the basis that the defendant had refused its many requests to provide it with copies of documents.

[22] This contention is without basis for it ignores 2 basic tenets in law in respect of parties engaged in litigation adversarial in nature:

(a) it is the plaintiff to prove its claim; and

(b) it is then for the defendant to establish its defence to such claim.

[23] As matters presently, the terms of the contract on which the plaintiff has premised its claim has been pleaded in para. 5 of its statement of claim and in this regard, the plaintiff issued a letter of demand dated 8 August 2000 to the defendant as pleaded in para. 7 of the statement of claim. It was only after this that the plaintiff commenced making requests for documents to support its own claim. This begs the question as to whether there were any materials to support its action in the first place.

[24] This fact has coloured the plaintiff's conduct of the suit for the reasons set out as follows:

(a) after issuing its letter of demand dated 8 August 2000, the plaintiff waited 2 1/2 years to commence this suit;

(b) the plaintiff did not nothing after that, and waited for one (1) year and five (5) months from the close of pleadings in this action to issue its case management notice in encl. 4; and

(c) as for the purported O. 24 notice, it is notable that the plaintiff did not produce its own list of documents for exchange, but was merely another request for the defendant's documents to bolster its claim.

[25] This is improper for the following reasons:

(a) it is improper at law to prosecute an action without any basis simply in the "hope that something may turn up";

(b) in other words, litigation for the purpose of discovery is always improper. In the context of this case, the plaintiff cannot issue a suit, and then wait some more to develop its case as and when it deems fit. This is an abuse of process; and

(c) the effect of such an extraordinary demand in the O. 24 notice is to shift the burden to the defendant to take a fresh step in the suit in spite of the plaintiff's own indolence in prosecuting this action. This is clearly a fishing expedition at the expense of the defendant in defending the plaintiff's claim.

[26] The English Court of Appeal in *Re Soul D Harrison & Sons plc* [1995] 1 BCLC 14 had this to say:

> ... But the question here in this case is whether on evidence taken as a whole, and assuming in favour of the Petitioner any disputed question of primary fact, there is any case to answer. Of course it is always possible that discovery and cross-examination may

A produce some written or oral confession that the board were indeed acting in bad faith. But I do not think that the Petition can be allowed simply to proceed to trial simply in the hope that something may turn up.

B **[27]** This approach has also been applied in writ actions. In *Overseas-Chinese Banking Corporation v. Norman Wright & Co.* [1989] 3 MLJ 73, it was held:

... The 1st and the 3rd Defendants in the defence allege that the Plaintiffs have been negligent. As I have pointed out above, they C have not set out any specific particulars of negligence.

If they had particularised specific instances of negligence, then interrogatories could be raised on those specific particulars of negligence. Without particulars, they cannot interrogate. The further particulars which the 1st Defendant furnished clearly show that the D 1st Defendant did not know what measures the Plaintiffs had failed to undertake. By interrogatories nos 6 and 7, the Defendants are, in effect, asking the Plaintiffs, "please tell me what steps you have not taken so that I could show negligence on your part and thus substantiate my comment as fair E comment." In my opinion, interrogatories sought by the 1st and 3rd Defendants are in truth a clear case of fishing. This cannot be allowed. They hope, through this process, to be able to stumble upon something which will show that their comment was fair or even enable them to plead justification. This is not a legitimate function of interrogatories.

F **[28]** When that is all said and done, this still affords no explanation for the plaintiff's dilatoriness in prosecuting this action. For the plaintiff to rely on the O. 24 notice merely underlines its concession that it had commenced the suit without basis and is G hoping that something may "turn up" in the discovery process. This is an illegitimate use of the court process.

[29] It follows that the plaintiff's allegation of the defendant's purported blameworthiness also wholly fails and surely cannot be utilise to justify its delay. In the absence of a cogent explanation, H the delay to prosecute this action is not only inordinate but also inexcusable.

[30] The plaintiff is guilty of inordinate and inexcusable delay and blatant disregard of the relevant rules with full awareness of the I consequences of it conducts. And such, that by itself is sufficient ground to strike out or dismiss its claim for want of prosecution without having to prove that the defendant suffer prejudice. In the

present case, the case in favour of the defendant is much more stronger in the sense that the defendant has shown to the court it would be prejudiced by the plaintiff's conduct or a fair trial of the issues may be prejudiced.

[31] In the present case, it remains clear that the defendant is subject to a claim that the plaintiff contrives as and when it deems fit at its leisure. Prejudice occasioned to the defendant may take in various forms, and it is not necessarily confined to prejudice affecting the actual conduct of trial. The Court of Appeal in *Trustees of Leong San Tong* observed as follows:

> At p 904 Lord Griffins (in the case of *Department of Transport v. Chris Smaller (Transport) Ltd.* [1989] 1 All ER 897 the House of Lords) said:
>
> > ... These authorities clearly establish that prejudice may be of varying kinds and it is not confined to prejudice affecting the actual conduct of the trial. It would be foolish to attempt to define or categorise the type of prejudice justifying striking out an action, but there can be no doubt that if the Defendants had been able to establish significant damage to their business interests, flowing directly from the culpable delay of 13 months after the issue of the writ, a judge would have been entitled to regard it as prejudice justifying striking out the action ...
>
> From the above authorities, it is clear to us that the prejudice is not confined to only adducing evidence in Court but also prejudice which a Defendant would have suffered due to delay as affecting limitation period, a fair trial not being possible, and business interests.

[32] The prejudice that may be occasioned to the defendant is further underlined by the fact that potential witnesses whom the defendant would have called to its defence at trial have since left the employment of the defendant and their current whereabouts are not known.

[33] In this respect, Mokhtar Sidin JCA in *Trustees of Leong San Tong Khoo,* has this to say:

> Thus, when the appellants stated in the affidavit that their witness who carried the demolition on the instruction of the appellants are not available because they have left the services of the appellants, the appellants have succeeded to show that they are prejudiced of a fair trial.

[34] In the present case, if the plaintiff's claim is allowed to proceed, the court is of the view that there can be no fair trial of this matter and the prejudice occasioned by the plaintiff's conduct thus far in this action is substantial.

The Plaintiff's Submission

[35] The plaintiff has raised three issues in resisting the defendant's striking out application in encl. 6 which may be summarised as follows:

(a) that the defendant has failed to make its striking out application in encl. 6 in a prompt manner;

(c) that the action was in fact set down for trial *vide* its case management notice in encl. 4; and

(d) that the action is not obviously unsustainable.

[36] The court is of the view that these contentions are wholly irrelevant and/or misconceived. The court shall now deal with these contentions.

1st Issue: Defendant's Purported Delay

[37] The plaintiff has made much of the defendant's purported delay in making its striking out application in encl. 6.

A necessary distinction is to be drawn between:

(a) an application made to strike out for want of prosecution; and

(b) an application made to strike out a claim which on the face of it is "obviously unsustainable".

[38] The defendant's striking out application in encl. 6 is premised on the plaintiff's want of prosecution. Given this, the purported issue of delay on the part of the defendant in making its striking out application in encl. 6 is misconceived for there is no obligation on the part of the defendant, legal or otherwise, to ensure a speedy disposal of the plaintiff's action against itself. Lord Diplock in *Allen v. Sir Alfred McPhine & Sons Ltd.* had this to say:

> It is thus inherent in an adversary system which relies exclusively upon the parties to an action to take whatever procedural steps appear to them to be expedient to advance their own case, that the Defendant, instead of spurring the Plaintiff to proceed to trial,

can with propriety wait until he can successfully apply to the Court to dismiss the Plaintiff's action for want of prosecution on the ground that so long a time has elapsed since the events alleged to constitute the cause of action that there is a substantial risk that a fair trial of the issues will not be possible.

[39] It is thus for the plaintiff to ensure the process of conclusion of the action is expedited. (see: *Negara Properties Sdn. Bhd. v. Akitek Bersekutu Malaysia* [1996] 2 CLJ 923).

[40] It is not for the defendant to promptly make an application to strike out the plaintiff's claim for want of prosecution on the ground that the plaintiff has failed to take the necessary step to get the case going after the close of pleadings.

2nd Issue: Plaintiff's O. 34 r. 2 Notice

[41] Contrary to the assertions of the plaintiff, the plaintiff did not issue a notice of its intention to proceed pursuant to O. 3 r. 6 of the RHC. A perusal of the records of this court will show this.

[42] The plaintiff, with hindsight, appears to be now contending that its letter dated 25 August 2004 to the defendant through its solicitors constituted as notice of its intention to proceed under O. 3 r. 6 of the RHC.

See: plaintiff's letter dated 25 August 2004 through its solicitors (exh. "EX9" in the defendant's 1st affidavit in encl. 5).

[43] It must be noted that this letter was issued in response to the defendant having taken objections to the manner in which the O. 24 notice was issued by the plaintiff. Reading it in its proper context, it becomes apparent that this letter was issued in response to the defendant having rebuffed the plaintiff's attempts to contrive its claim against the defendant at its leisure.

[44] The following considerations set the plaintiff's current position into perspective:

(a) under O. 34 r. 2 of the RHC, the case management notice is to be made not later than 14 days from the close of pleadings;

A (b) the plaintiff took one (1) year and five (5) months to do so without any explanation as to why it would have been impossible to do so within 14 days from the close of pleadings and that it could only have done so one (1) year and five (5) months later;

B (c) under O. 3 r. 6 of the RHC, a plaintiff must give one month's notice of its intention to proceed where one year or more has since elapsed since the last proceeding in a cause or matter; and

C (d) the plaintiff's letter of 25 August 2004 was issued after the case management notice was given – the latter therefore had nothing to do with any intention of the plaintiff to proceed in this matter nor any notice under O. 3 r. 6 of the RHC to do so.

D **[45]** Given this, it becomes apparent that this letter was not issued by the plaintiff with the object of complying with O. 3 r. 6 of the RHC.

E **[46]** It matters not that the defendant had made its striking out application in encl. 6 subsequent to the plaintiff's filing of its case management notice in encl. 4. It does not in any way alter the position that the plaintiff was guilty of inordinate and inexcusable delay in prosecuting its claim against the defendant. Even if the F case management notice was filed, the fact still remained that there was a delay in taking out that step. Likewise in *Trustees of Leong San Tong Khoo*, the Court of Appeal held that the delay occasioned by the plaintiff in taking out a summons for directions by one year and nine months from the date of close of pleadings G was inordinate and inexcusable, and the action was accordingly struck out on the application of the defendant therein. In that case, the striking out application was also filed after the summons for directions was filed by the plaintiff.

H Therefore, the plaintiff's contentions on this issue are wholly unmeritorious.

3rd Issue: Action Not Obviously Unsustainable

[47] The plaintiff also contends that this action ought not to be I struck out as it has a claim which is not obviously unsustainable.

The court cannot understand how this contention is related to the defendant's application to strike out the claim for want of prosecution. It must be reiterated that the defendant's striking out application in encl. 6 is premised on the plaintiff's failure to prosecute this action. The defendant's striking out application in encl. 6 therefore plainly does not concern the merits of the plaintiff's action against the defendant.

[48] The plaintiff has clearly missed the point it remains that the plaintiff has failed to prosecute this action which has been compounded by the plaintiff's blatant and wholesale disregard of the relevant rules to the prejudice of the defendant.

Conclusion

[49] The court is satisfied that the learned SAR did not err in making an order that the plaintiff's claim be struck out on 14 April 2005. There is ample evidence to support the defendant's application to strike out the plaintiff's claim. The inordinate and inexcusable delay as well as the blatant disregard of the rules may be caused by the plaintiff itself or its solicitors. If they were caused by the plaintiff itself, then the plaintiff has to face the music of its own wrongdoings. If on the other hand, they were caused by the solicitors, then the plaintiff may have recourse against the solicitors for professional negligence. In any event, the defendant should not be deprived if its right to expeditious and fair trial of the matters. Based on the authorities considered above the court is making an order that the appeal by the plaintiff against the said decision of the learned SAR be dismissed with costs.